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The Supreme Court of the United States
OCTOBER TERM, 1949

No......

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of the United States:

Atlantic Coast Line Railroad Company, your petitioner, respectfully shows:

I

Summary Statement of the Matters Involved

On October 6, 1947, the respondent, L. C. Haselden, a section master of the petitioner, Atlantic Coast Line Railroad Company, commenced an action in the Court of Common Pleas of Darlington County, South Carolina, against Atlantic Coast Line Railroad Company, your petitioner, under the Federal Employers' Liability Act (U. S. C., Title 45, secs. 51-59) seeking to recover damages in the sum of fifty thousand dollars ($50,000.00) on account of personal injury alleged to have been sustained by respondent while he

and his section crew were loading rails on a gondola car at Society Hill, South Carolina, it being alleged in the complaint (R. 6) that the injury was sustained when "in the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot." It was also further alleged that the injury was due to the negligence of the defendant, Atlantic Coast Line Railroad Company, in the following particulars (R. 6, 7):

> "a. In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch.
>
> "b. In failing to provide plaintiff with a safe place to work in directing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load said rails.
>
> "c. In failing to provide plaintiff with a safe place to work in that he was not given sufficient help with which to load said rails.
>
> "d. In failing to provide plaintiff with a safe place to work after notice that the same was insufficient.
>
> "e. In failing to provide plaintiff with proper, adequate, and safe tools and equipment with which to work.
>
> "f. In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth.
>
> "g. In failing to provide plaintiff with proper supervision and direction with which to work.

"h. In allowing said rail to become caught and suddenly spring loose, striking plaintiff without warning."

Your petitioner, Atlantic Coast Line Railroad Company, denied the allegations of negligence, and the case came on for trial before the Court and a jury in the Court of Common Pleas of Darlington County, South Carolina, on May 10, 1948.

Respondent offered no testimony at all other than his own as to the manner in which his injury occurred. He testified that he was instructed by the roadmaster, his immediate superior, to load ten rails on a car and ship them to McFarlane, N. C., that in loading the rails it was necessary to move them across a ditch, that he requested a flat car on which to load the rails, but that instead of a flat car being sent he received a gondola car (R. 28-29). He thus states the manner in which his injury was received (R. 29-30):

"Q. Would you just show the jury here exactly how you proceeded to load those rails?

"A. The rails were over here, we put the rail up and put a rope around there and pulled it up within six or eight inches of the top.

"Q. Where were you?

"A. Inside the car.

"Q. Where were the other men?

"A. Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end

> of the car and I turned around, came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it."

He then further testified in substance that if a flat car instead of a gondola car had been sent the rail could have been loaded more easily and safely (R. 30).

At the conclusion of respondent's testimony petitioner moved for a nonsuit on the ground that there was a failure of proof of actionable negligence, and at the conclusion of all the testimony moved for a directed verdict generally on the same ground. Both of these motions were overruled. After its motion for a directed verdict generally was overruled petitioner moved for a directed verdict as to each specification of negligence separately on account of failure of proof, and all of these motions were also overruled. The case was then submitted to the jury upon the testimony presented and the charge of the presiding Judge. With other instructions not deemed relevant, the presiding Judge charged the jury as follows as to the measure of the duty of the master to furnish a safe place to work and safe tools and appliances (R. 99):

> "Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time."

The jury rendered a verdict in favor of respondent against petitioner for the sum of forty-five thousand dollars ($45,000.00), and after the return of the verdict petitioner moved for judgment in its favor *non obstante veredicto*, on the grounds upon which its motions for nonsuit and for directed verdict were based, and it also moved in the alternative for a new trial on the ground, with other grounds not now deemed relevant, that the plaintiff had failed to prove any actionable negligence on the part of the defendant (R. 104-105). By an order dated June 24, 1948, petitioner's motions were overruled (R. 106-116).

Pursuant to the verdict of the jury and the order of the Court judgment was thereafter entered in the Court of Common Pleas of Darlington County, South Carolina, in favor of respondent and against petitioner for the sum of forty-five thousand dollars ($45.000).

Petitioner appealed to the Supreme Court of South Carolina from the judgment of the Court of Common Pleas of Darlington County, South Carolina, alleging error on the part of the trial Court in the following particulars, and also in other particulars not now deemed relevant: (1) in refusing petitioner's motions for a nonsuit, for a directed verdict generally, for a directed verdict as to each separate specification of negligence, and for judgment *non obstante veredicto*, or for a new trial in the alternative, on account of failure of proof of actionable negligence on the part of petitioner (R. 116-121); (2) in giving to the jury the charge above quoted in relation to the measure of the duty of the master to furnish a safe place to work and safe tools and appliances (R. 120).

Petitioner's appeal having been heard, the Supreme Court of South Carolina on April 1, 1949, filed an opinion affirming the judgment of the Court of Com-

mon Pleas of Darlington County, South Carolina, but on April 11, 1949, within the time permitted under the rules of practice prevailing in the State of South Carolina, petitioner filed a petition for a rehearing (R. 146), which suspended the finality of the State Court's judgment pending the Court's further determination as to whether its judgment should be modified so as to alter its adjudication of the rights of the parties. On April 26, 1949, the Supreme Court of South Carolina filed an order refusing and dismissing the petition for rehearing. Under the practice prevailing in South Carolina no final judgment separate and apart from the opinion of the Supreme Court of the State is rendered (Clerk's Certificate, R. 155), and upon the refusal of petitioner's petition for rehearing on April 26, 1949, the opinion of the Supreme Court of the State of South Carolina, which is the highest Court of the State, became the final judgment in the cause.

II

Statement of Basis Upon Which it Is Contended That Supreme Court Has Jurisdiction

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this case is that the case was brought, tried and decided under the Act of the Congress of the United States commonly referred to as The Federal Employers' Liability Act. (U. S. C., Title 45, sections 51-59), and under that Act this Court is vested with the final authority to determine all questions as to the weight and sufficiency of evidence to support a verdict and as to the rights and obligations of the parties arising by virtue of the provisions of the Act. *Brady vs. Southern Ry Co.*, 320 U. S., 476.

III

The Questions Presented

The following are the questions here presented for consideration. (1) Was there sufficient evidence of negligence to justify the submission of the case to the jury? (2) Was there prejudicial error in the refusal to withdraw all or at least some of the separate specifications of negligence from the consideration of the jury on account of insufficiency of proof? (3) Was the jury erroneously instructed as to the duty of the master in relation to furnishing a safe place to work and safe tools and appliances?

IV

Reasons Relied on for Allowance of Writ

The decision and judgment of the Supreme Court of South Carolina is not in accord with applicable decisions of this Court in relation to Federal questions, and your petitioner alleges that a writ of certiorari should be granted by this Court to review and reverse the judgment of the Supreme Court of South Carolina herein for the following reasons:

(1) There was a failure of proof of any actionable negligence on the part of petitioner and petitioner's motion for a nonsuit on that ground (R. 52) should have been granted.

(2) There was a failure of proof of any actionable negligence on the part of petitioner, and petitioner's motion for a directed verdict on that ground (R. 93) should have been granted.

(3) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (a) in

paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." (R. 6).

(4) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (b) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in directing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load said rails." (R. 6).

(5) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (c) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work in that he was not given sufficient help with which to load said rails." (R. 7).

(6) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (d) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with a safe place to work after notice that the same was insufficient." (R. 7.)

(7) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (e)

in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper, adequate, and safe tools and equipment with which to work." (R. 7.)

(8) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (f) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth." (R. 7.)

(9) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (g) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In failing to provide plaintiff with proper supervision and direction with which to work." (R. 7.)

(10) Petitioner's motion for a directed verdict (R. 93) as to specification of negligence designated (h) in paragraph 8 of the complaint should have been granted on account of failure of proof of negligence in that respect, the said specification being as follows: "In allowing said rails to become caught and suddenly spring loose, striking plaintiff without warning." (R. 7.)

(11) The Court below was in error in sustaining the following charges to the jury as a correct statement of the law:

"Now, I charge you, gentlemen, that there is a

positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time." (R. 99.)

This charge is believed to have been erroneous and prejudicial for the reason that from it the jury might well have understood that the duty of the master in relation to the reasonable safety of the instrumentalities wherewith and the places wherein to work is an absolute one, thereby placing upon petitioner a heavier burden than the law exacts, in that the master 'is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end." *Lehigh Valley R. R. Co. vs. Beltz* (C. C. A. 2nd. Cir.), 10 Fed. (2d), 74; *Yazoo and Mississippi Valley R. Co. vs. Mullins*, 249 U. S., 531; *B. & O. S. W. R. Co. vs. Carroll*, 280 U. S., 491.

(12) The State Court was in error in refusing petitioner's motion for judgment *non obstante veredicto* or for a new trial in the alternative on account of insufficiency of proof of any actionable negligence on the part of petitioner. (R. 104, 105.)

WHEREFORE, Atlantic Coast Line Railroad Company, your petitioner, prays that a writ of certiorari be issued to the Supreme Court of the State of South Carolina to the end that this cause may be reviewed and determined by this Court as provided by law, and

that upon such review the judgment of the Supreme Court of South Carolina be reversed.

Atlantic Coast Line Railroad Company

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The Supreme Court of the United States
OCTOBER TERM, 1949

No......

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

BRIEF OF PETITIONER

Official Report of Opinions Delivered in the Courts Below

The decision of the Supreme Court of South Carolina has not yet been officially reported. It will be found on page 126 of the record, and in 53 S. E. (2d), page 60, Advance Sheets of May 26, 1949.

Statement of Grounds of Jurisdiction

This has already been set forth in the preceding petition (page 6), and the statement there found is here adopted by reference.

Statement of the Case

Under the heading "Summary Statement of the Matters Involved" in the preceding petition (page 1) a sufficient statement will be found to understand the

case, and what is there said is here adopted by reference.

Specification of Assigned Errors

Under the heading "Reasons Relied on for Allowance of Writ' in the preceding petition (page 7) will be found a full statement of the errors intended to be urged by petitioner as reasons for allowance of the writ, and that part of the petition is here adopted by reference. For convenience, however, the errors there alleged are here summarized as follows:

(a) The State Court erred in holding that there was sufficient proof of actionable negligence on the part of petitioner to justify a verdict in favor of respondent. The question as to the sufficiency of the evidence was made by petitioner in the trial Court by motion for nonsuit (R. 52), by motion for a directed verdict (R. 93), and by motion for judgment *non obstante veredicto* or for a new trial in the alternative (R. 104, 105), and in the Supreme Court of South Carolina by Exceptions 1 (R. 116), 3 (R. 117), 15 (R. 121), and 17 (R. 121).

(b) The State Court erred in sustaining the submission by the trial Court for the consideration of the jury of specifications of negligence not supported by evidence and not a proximate cause of the injury of respondent. The question as to the sufficiency of the evidence to justify the submission of these specifications of negligence to the jury was raised by petitioner in the trial Court by motion for directed verdict (R. 93, 94) and in the Supreme Court by Exceptions 5 (R 117), 6 (R. 117, 118), 7 (R. 118), 8 (R. 118), 9 (R. 118, 119), 10 (R. 119), 11 (R. 119), and 12 (R. 119).

(c) The Supreme Court of South Carolina erred in

sustaining the trial Court's charge to the jury as to the extent of the employer's duty in relation to furnishing a safe place to work and safe tools and appliances with which to work. This question was made in the Supreme Court of South Carolina by Exception 14 (R. 120, 121).

ARGUMENT

Point I

Was There Sufficient Evidence of Actionable Negligence to Justify the Submission of the Case to the Jury?

As will be seen from the foregoing petition, the respondent, L. C. Haselden, a section master of the petitioner, has recovered judgment against petitioner for forty-five thousand dollars ($45,000.00) in an action under the Federal Employers' Liability Act on account of personal injury alleged to have been sustained while he and his section crew of five men were loading rails on a gondola car. It was alleged in the complaint (R. 6) that the injury was sustained when "in the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot"; and it was further alleged that the injury was due to the negligence of the defendant railroad company in various particulars to which more detailed reference will be made later.

Respondent introduced no testimony at all as to the manner in which his injury was sustained other than his own, he being his only witness as to the actual circumstances connected with his injury and the manner in which it was received will be found in the Record at pages 28-30. It is rather obscure, and it would probably be somewhat clearer if read in full from the record, but it is obviously too long to quote.

The substance of this direct testimony of respondent is that on the afternoon preceding his injury he was instructed by the roadmaster to load ten rails on the next morning and ship them to McFarlane, N. C.;

that he was told to get a flat car and if he could not get a flat car to get a gondola; that he could not get a flat car and was furnished a gondola, and (to use his own language) "I told them if they sent a gondola I would not be able to load it from where the rails are at"; that he was told (using his own language again) "to put up some skids and load them from the side and take some short rails and load from the side and get some rope and load from the side" (R. 29).

He then testified as to the manner in which his injury was sustained as follows (R. 30): "Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end of the car and I turned around and came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it." He also further testified (R. 30) that if he had been furnished a flat car the rail could have been pushed up without getting it out of reach of the men on the ground.

It perhaps should be observed in passing that Mr. Dail, the roadmaster, took issue with respondent's version of his instruction. Mr. Dail testified (R. 68) that he instructed respondent to load ten rails and ship them, and that he had no further connection with the transaction and heard nothing further from it until it was reported to him that respondent had been injured.

The cross examination of the respondent Haselden is important and throws much light on the situation. It is too long to quote verbatim, but it will be found in the Record at pages 37-39.

The substance of this cross examination of the respondent Haselden is to the effect that he had been a section foreman since July 3, 1944; that loading rails was one of his regular duties and that he had loaded them before; that he was instructed to load ten rails from a pile of about forty across a ditch from the railroad; that he selected the rails to be loaded; that his crew other than himself consisted of five men, who were hired by him and who started work, stopped work and did their work under his instructions, he being in charge of them; that he had a new rope and a chain strong enough to load; that nothing about the equipment broke; and that five rails had already been successfully loaded into the car in the same manner as the sixth rail, which caused the injury, was being loaded.

We believe it will be very evident from an examination of the record that respondent must base his right to recover on these three alleged delicts: (1) one of the rails was bent and consequently caught on the gondola thereby causing the loose end to spring over and strike him (R. 6); (2) he was not furnished enough men to load the rails (R. 29); (3) a gondola car was furnished for the loading instead of a flat car (R. 30).

In the light of the decisions of this Court, which of course has the final word in cases arising under the Federal Employers' Liability Act, it is respectfully submitted that there has been a total failure of proof of any actionable breach of duty on the part of petitioner in either of the three particulars above stated.

As held by the Court in *Ellis vs. Union Pac. R. R. Co.*, 329 U. S., 649:

> "The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury."

In *Missouri Pac. R. R. Co. vs. Aeby*, 275 U. S., 426, a case involving an injury to an employee due to an alleged defect in a station platform, it was said in relation to the duty of the master:

> "Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances."

The master is not required to supply any particular type of place to work or tools or appliances with which to work, or to maintain them in the safest and best possible condition.

> "It is a well-established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions, or to discard appliances upon discovery of later improvements, provided the boiler was in proper condition and safe to operate, as required by the statute."
>
> *Baltimore & Ohio R. R. Co. vs. Groeger*, 266 U. S., 521.

"The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. Baltimore & O. R. Co. v. Groeger, 266 U. S., 251, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt."

Missouri Pac. R. R. Co. vs. Aeby, 275 U. S., 426.

In *Brady vs. Southern Ry. Co.*, 320 U. S., 476, a case involving a fatal injury to an employee when a freight car went off the track in passing over the wrong end of a derailer while being backed into a switch track, the Court in holding that there was a failure of proof of actionable negligence said:

"The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. P. R. Co. v. Kellogg, 94 US 469, at 475, 24 L. ed. 256, at 259:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable prevision need not be anticipated. * * *."

It was also further said in the Brady case:

> "The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

It cannot reasonably be said that the fact that there was a bent rail in a pile of forty rails, from which respondent was directed to load ten rails on a car (R. 38), constituted any actionable breach of duty on the part of the petitioner. It cannot be deemed an unusual operation for a section crew to load rails to be shipped to other points. In fact, respondent testified (R. 37) that this was one of the usual duties which he had previously performed, and it certainly cannot be reasonably suggested that because a rail is bent it must not be shipped. It is inevitable that if rails are used they must sometimes become bent. Aside from these considerations, however, how can it be said that petitioner should have foreseen that respondent, an experienced workman, would select a bent rail from a pile of forty rails in order to make out the ten rails to be shipped, and that the bent rail would get caught on the car onto which it was being loaded and spring over and injure him? There is no evidence that an attempt to load a bent rail on any other occasion had resulted in injury to anyone, nor is there anything in the record to indicate that the presence of a bent rail in the pile of forty rails was due to any negligent or wrongful act on the part of petitioner, or that resulting injury to the respondent ought to have been foreseen in the light of attending circumstances. As well said in *Boyleston vs. Southern Ry. Co.*, 211 S. C., 232, 44 S. E. (2d), 537:

> "Negligence carries with it liability for consequences which, in the light of attendant cir-

cumstances, could reasonably have been anticipated by a prudent man, but not for injuries which though possible, were wholly improbable. One is not charged with foreseeing that which could reasonably not be expected to happen."

It seems equally clear that it cannot be fairly said that petitioner failed to exercise reasonable care in furnishing a sufficient number of men to load the rails. How can it be said that petitioner ought to have foreseen that six grown men experienced in this kind of work, respondent and five others selected by him, were not enough to load the rails, especially in view of the fact that these same men on that same morning already had loaded five rails of the same kind in the same manner and in the same car without trouble or mishap. There is a total absence of testimony that the number of men was insufficient to load these rails, and as a matter of fact, respondent's complaint is not based upon any such theory, but upon the wholly different theory that due to the fact that one of the rails was bent it caught on the gondola, causing the loose end to spring over and strike plaintiff (R. 6).

As to the charge in relation to furnishing a gondola car for the loading instead of a flat car, to surmise that if a flat car had been furnished instead of a gondola the accident might not have happened is not enough, and we respectfully submit that there is no word of testimony upon which to base such an inference. As said in *Brady vs. Southern Ry Co.*, 320 U. S., 476: "The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Furthermore the record will be searched in vain for any evidence that a gondola car is not a proper instru-

mentality on which to load rails, and if there were any statement to that effect it would be abundantly disproved by the fact that five rails had been safely loaded into a gondola on that morning in the same way and by the same men without difficulty or injury to anyone. Also there is no evidence that additional help had been required on previous occasions or that the loading of rails on a gondola on any other occasion had resulted in injury to anyone.

Point II

Did the State Supreme Court Err in Sustaining the Submission for the Consideration of the Jury of Specifications of Negligence Not Supported by Evidence and Not a Proximate Cause of the Injury?

In *Wilmington Star Mining Co. vs. Fulton*, 205 U. S., 60, the Court said:

> "The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the 2d, 3d, and 6th counts of the declaration, and in refusing to instruct the jury that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular acts of negligence charged in those counts. Such counts, as we have seen, related to the failure to construct crosscuts and stoppings in the mine, and to an alleged defect resulting from the absence of a wheel, and the consequent necessity of using a wrench for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ventilating fan. We are constrained to the con-

clusion that prejudicial error was committed in these particulars."

In the same case the Court also had the following to say in relation to the effect of an Illinois statute which it was claimed rendered the errors complained of not prejudicial:

> "This statute, of course, lends no support to the contention here made that where a jury is wrongfully permitted, over the objection of the opposing party, to take into consideration, in reaching a verdict, counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded."

The question also arose in the case of *Chicago St. P. M. & O. Ry Co. vs. Kroloff*, (8th Cir.), 217 Fed., 525, in which it was said:

> "A refusal by the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict."

Also in *Baltimore & Ohio R. R. Co. vs. Deneen* (4th Cir.), 161 Fed. (2d), 674, it is said:

> "The law is well settled that where there is no

> evidence to sustain certain counts in the declaration as to defendant's negligence, defendant is entitled to an instruction that no recovery can be had on those counts. And failure so to instruct in the instant case was prejudicial error, since it cannot be determined on which count the jury based its verdict against defendant."

See also to the same effect *Southern Ry Co. vs. Hardin* (5th Cir.), 157 Fed., 645; *Murray, et al. vs. Third Nat. Bank* (6th Cir.), 234 Fed., 481; *Lehigh Valley R. R. Co. vs. Normile* (2nd Cir), 254 Fed., 680.

On the trial of the case petitioner moved for a directed verdict separately as to each specification of negligence contained in the complaint on the ground that there was no proof of negligence as to such specification (R. 93). This motion was refused, and the lower Court was sustained by the Supreme Court of South Carolina.

Specification (a) is a follows (R. 6): "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." Even if it be conceded that directing respondent to load the rails across a ditch would constitute negligence, there is not only no evidence to the effect that respondent received any injury on account of being directed to load rails across a ditch, but the evidence shows affirmatively and conclusively that the loading of rails across a ditch had absolutely nothing to do with his injury. When he was injured five rails had already been loaded from across the ditch and the sixth rail, from which he received his injury, had already been moved across the ditch without mishap and was being placed in the car (R. 39).

Specification (b) is as follows (R. 6-7): "In failing to provide plaintiff with a safe place to work in direct-

ing him to load heavy iron rails with improper equipment and with faulty and weak skids with which to load rails." There is a total absence of any testimony whatever that the equipment was improper, or that the skids were faulty and weak or failed in any manner to perform their function. The testimony of respondent himself shows that there was nothing defective about the loading appliances and that there was no failure of the skids to function (R. 39).

Specifications (c), (d), (e) and (h) (R. 7) will not be discussed here for the reason that they have already been covered by what has heretofore been said under the heading "Was There Sufficient Evidence to Justify Submission of the Case to the Jury?"

Specification (f) is as follows (R. 7): "In failing to provide plaintiff with proper, reasonable, and safe plans and method with which to work in loading said rails as herein set forth." We fail to find any testimony at all in support of this specification. According to respondent's own testimony the loading of rails was one of his duties as section foreman. He himself hired the workmen and had entire charge of the operation (R. 37-39).

Specification (g) is as follows (R. 7): "In failing to provide plaintiff with proper supervision and direction with which to work." We also fail to find any testimony at all to support this specification. On the contrary petitioner's own testimony shows (R. 38) that he himself had the entire supervision and direction of the work.

Point III

Did the Supreme Court of South Carolina Err in Sustaining the Trial Court's Charge to the Jury as to the Employer's Duty in Relation to Furnishing a Safe Place to Work and Safe Tools and Appliances?

Relying largely upon the South Carolina cases of *Nuckolls vs. Great Atlantic & Pacific Tea Co.*, 192 S. C., 156, 5 S. E. (2d), 862, and *Tucker vs. Holly Hill Lumber Co.*, 200 S. C., 259, 20 S. E. (2d), 704, the State Court in its opinion sustained the following charge as a correct statement of the applicable law in relation to the master's duty to furnish a safe place to work and safe tools and appliances (R. 99, 134, 135):

> "Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time."

In sustaining this charge it is respectfully submitted that the State Court failed to give effect to the rule that State decisions are inapplicable in a suit under the Federal Employers' Liability Act, and that the duty of the employer is governed wholly by the Federal law without regard to the State law, as thus stated in *Bailey vs. Central Vermont Ry.*, 319 U. S., 350: "The rights which the Act creates are federal

rights protected by federal rather than local rules of law."

The State Court also cites in support of its conclusion *Patton vs. Texas and Pac. Ry. Co.*, 179 U. S., 658, in which the duty of the master to furnish a safe place to work is referred to as "positive." It may be observed, however, that this case was decided in 1901 and was not a case arising under The Federal Employers' Liability Act. Furthermore, it should be observed that the context clearly indicates that the Court used the word "positive" in the sense of "nondelegable." In this connection it was said: "That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, *and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe.*" (Emphasis added by petitioner).

The State Court further cites in its opinion the case of *Bailey vs. Central Vermont Ry. Co.*, supra, in support of the charge of the trial Judge. It is respectfully submitted, however, that a careful reading of the case will show that it is not in point and makes no reference to the point in issue, but if in point at all that it tends to support the position of petitioner rather than that of respondent. In this case, *Patton vs. Texas & Pacific Ry. Co.*, supra, is cited but in relation to a totally different question.

The State Court in its opinion also quotes in support of its approval of the charge of the trial Judge the following from Vol. 33, page 57, of Words and Phrases:

> "In an action for injuries to a servant, a charge that 'the master owes the positive duty to an employee to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe,' is a correct statement of the law, and *is not objectionable as requiring the master to insure the safety of the place; the word 'positive' being used rather as the antithesis of the word 'delegable' than as a measure of the diligence required of a master.* Harris vs. Brown Bay Logging Co., 106 P. 152, 154, 57 Wash. 8." (Emphasis added by petitioner.)

The foregoing statement from Words and Phrases is based upon the Washington case of *Harris vs. Brown's Bay Logging Co.*, 57 Wash., 8, 106 Pac., 152, and the part of the quotation we have underscored plainly shows that the word "positive" was used in the sense of "nondelegable" *rather than as a measure of the diligence required of the master.* As to the same case also see note 14 (a) 49 Corpus Juris, page 1089.

It has been definitely and positively settled by the decisions of the Supreme Court of the United States that the employer does not owe an absolute duty to provide a safe place to work and safe tools and appliances but is only required to exercise reasonable care to that end.

In *Seaboard Air Line Ry. vs. Horton*, 233 U. S., 492, an action under the Federal Employers' Liability Act, the Supreme Court of North Carolina sustained as proper the following charge in relation to furnishing a safe place to work and safe appliances:

> "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue, 'Yes' ".

In holding this to be an incorrect statement of the law the Supreme Court of the United States said:

> "The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."

In the case of *Yazoo and Mississippi Valley R. Co. vs. Mullins*, 249 U. S., 531, plaintiff recovered judgment in an action under the Federal Employers' Liability Act. Upon review by the United States Supreme Court, it was contended that the trial judge erred in his charge respecting the master's duty regarding the safety of his servant's place of work. In its opinion on this question the Court said:

> "It may be, as contended by the administratrix, that there was sufficient evidence of negligence to go to the jury, and that the general instruc-

> tions concerning negligence were proper. But the trial court also instructed the jury that 'it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment.' It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. (Citing numerous authorities). As examination of this record does not convince us that the admitted error was harmless, the judgment of the Supreme Court of Mississippi is reversed."

In *Baltimore & Ohio S. W. R. Co. vs. Carroll*, 280 U. S., 491, plaintiff recovered judgment in an action under the Federal Employers' Liability Act, and a similar question was presented regarding the trial Judge's instructions relative to the master's duty. We quote from the Court's opinion the following:

> "On the other hand, the charge in respect to the duty of the employer to furnish safe appliances was without qualification, and the jury might well have understood that the duty was an absolute one. That is not the law. The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end."

The Supreme Court of South Carolina adverts to the fact that in the cases from the Supreme Court of the United States here referred to the word "absolute" was used while the word "positive" was used in this case, and it is then suggested that the terms are not synonymous. We respectfully submit, however, that the Court has not given due weight to the fact that the same word is often used in different senses. The word

"positive" as used in the authorities relied upon by the State Court was used in the sense of "nondelegable", as previously pointed out, but in the charge of the trial Judge in this case it was plainly used in the sense of "absolute", and it could not possibly have been understood otherwise by the jury.

That "absolute" and "positive" may properly be considered synonymous will appear from the definition of the word "positive" in 49 C. J., 1089, where the first definition given is "absolute". This is also illustrated by the following quotation from the opinion of the Court in *Lehigh Valley R. R. Co. vs. Beltz* (2nd. Cir.), 10 Fed. (2d), 74:

> "*An 'absolute' duty is one which is not subject to any limitation or condition. It is positive and not dependent.* It is unqualified by any condiditions or considerations whatsoever. If the Boiler Inspection Act imposed on the defendant an absolute duty to have the boiler and appurtenances thereof safe to operate, and substituted that rule for the common-law rule, which holds the employer to ordinary care to provide his employees a reasonably safe place in which, and reasonably safe appliances and machinery with which to work, it in effect makes the employer an insurer of the safety of the place in which the employee works and of the appliances with which he works." (Emphasis added by petitioner.)

Even should it be conceded that the words "positive" and "absolute" cannot be deemed in any sense synonymous, nevertheless the remaining part of the charge complained of permits no doubt that the trial Judge used language which of itself imposed an absolute duty to furnish a safe place to work and safe tools and appliances with which to work. After stating in the

first sentence that the duty is positive, in the very next sentence the jury is instructed that "the master is required to furnish his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work", and this is not coupled even with any intimation that the duty of the master goes no farther than the exercise of reasonable care to the end that the tools and appliances may be reasonably safe. The next sentence is even stronger in emphasizing the idea that the duty of the master is absolute. The trial Court there says: "To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time". It is difficult to conceive how the jury could have been more explicitly instructed that the duty of the master is absolute.

In Labatt's Master and Servant (2nd. Ed.), Vol 3, section 920 (25), will be found the following very applicable statement of the law on this subject:

> "A jury is correctly instructed that a master does not insure his servants against injury. On the other hand, a verdict against the master will not be allowed to stand, where the trial judge has expressly laid it down that an instrumentality must be kept in such repair as to insure the safety of persons using it, nor where, although he has not used the word 'insure' in stating the nature and extent of the master's obligation, he has used language which may have been construed by the jury in such a sense that they supposed him to be absolutely bound to safeguard his servants. Hence it is error to use the epithets 'safe,' 'secure,' 'safe and sound,' or the like, for the purpose of describing the instrumentalities which the master is

> bound to furnish, unless it is also made quite clear to the jury that he is only required to use ordinary care in furnishing instrumentalities answering this description."

We do not think the additional suggestion of the Supreme Court of South Carolina to the effect that taking the charge as a whole it is free from error can possibly be sustained. The portion of the charge quoted by the State Court to sustain this statement (R. 135) seems only to further emphasize the impression which the jury must have received that the duty of the master to furnish a safe place to work and safe tools and appliances is absolute. Taking the parts of the charge we have quoted, as well as the charge as a whole, it is extremely difficult to conceive how the jury could possibly have received any other impression than that the master is held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, rather than only to the duty of exercising reasonable care to that end.

It is respectfully submitted that the State Court imposed upon petitioner in this case the duty required in a suit under the Safety Appliance Act and the Boiler Inspection Act, which is absolute, and not the duty imposed by the Federal Employers' Liability Act. *Brady vs. Terminal R. R. Assn.*, 303 U. S., 10; *Lilly vs. Grand Trunk Western R. R. Co.*, 317 U. S., 481.

The State Court also seems to imply that petitioner's counsel were required to call attention to the error when at the conclusion of the charge the trial Judge inquired if there was anything further (R. 104). Whatever may be the rule in the Federal Courts, it is not the rule of procedure in the Courts of South Carolina that counsel are required to call attention to errors of law in the charge of the Judge. Counsel is

required to call attention to a misstatement of the issues but not of the law. *Pinson vs. South Atlantic Realty Co., et al.*, 118 S. C., 262, 110 S. E., 392; *Steinberg vs. S. C. Power Co.*, 165 S. C., 367, 163 S. E., 881; *Coleman vs. Lurey*, 199 S. C., 442, 20 S. E. (2d), 65.

It can scarcely be contended that the charge of the trial Judge of which complaint is made was harmless. In jury trials erroneous rulings are presumptively harmful. As said in *Fillippon vs. Albion Vein Slate Co.*, 250 U. S., 76: "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

CONCLUSION

In conclusion it is respectfully submitted that a writ of certiorari should be issued to the Supreme Court of the State of South Carolina to the end that this cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted.

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The Supreme Court of the United States
OCTOBER TERM, 1949

No. 201

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

REPLY BRIEF OF PETITIONER

By way of reply to respondent's brief filed in opposition to the petition for a writ of certiorari herein petitioner begs leave to submit the following.

Point I

Was There Sufficient Evidence of Actionable Negligence to Justify the Submission of the Case to the Jury?

It cannot be fairly contended that this Court has ever departed from the rule that there can be no recovery under the Federal Employers' Liability Act for an injury without proof that it was due to negligence which was a proximate cause, in whole or in part, of the injury.

In the comparatively recent case of *Tennant vs. Peoria & Pekin Union Ry. Co.*, 321 U. S., 29, the Court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967. Petitioner was required to present probative facts from which the negligence and the casual relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' "

To the same effect is *Eckenrode vs. Pennsylvania R. R. Co.*, 71 Fed. Supp., 764; 164 Fed (2d), 996; 93 L. Ed., 64 (Advance Sheet No. 2); in which the opinion of the Supreme Court of the United States was filed on November 15, 1948.

Due consideration of the specifications of negligence contained in the complaint (R 6-7), in connection with the testimony and respondent's brief, will demonstrate that in actual substance respondent does not even claim that petitioner failed in the performance of any duty owing to him except in the following respects: (1) failure to furnish a flat car instead of a gondola for the loading of the rails; (2) failure to furnish a sufficient amount of help. Further analyzing these charges, in connection with respondent's own testimony and an express declaration contained in his brief, it will be seen that respondent in reality depends for recovery solely upon the failure to furnish a flat car.

Respondent testified (R 30):

"Q. Now, you say that the men here were pushing until it got out of reach?

A. Yes.

Q. If you had had a flat car as you ordered, would it have been necessary for them to push it that high up?

A. They could have pushed it up without getting it out of reach.

Q. The rail would not have ever been out of reach to the men on the ground?

A. No.

Q. If you had had a flat car as you ordered and did not receive, what would have been the way that it would have been loaded?

A. You could load on the skid but you would have had power to push it up with. Pulling with a small rope, we did not have power to load."

On page 13 of respondent's brief will be found the following express admission:

"Had petitioner furnished respondent with a flat car upon which to load the 935-pound rails, which is normally furnished, the five men with respondent would have been sufficient, as they would not have had to push the rails so high and could all have applied their strength at the same time."

It is true that in the same paragraph of respondent's brief it is said that it must also be kept in mind that respondent was not furnished "with proper ropes, etc.", but this charge as to the ropes was refuted by respondent's own testimony showing that he himself selected the rope and in addition had a chain to go around the rail. As to this he gave the following testimony (R 38-39):

"Q. Now, you spoke a while ago of having a rope tying up one end of the rail as it was being pulled up to the car, where did you get that rope?

A. I bought the rope from Mr. Bradshaw's store.

Q. And did you have a chain too?

A. I had a chain around the rail.

Q. Where did you get the chain?

A. I found it down in the yard.

Q. In the loading of those rails did the rope or chain or either one of them break?

A. No.

Q. Was that a new rope you were using?

A. Yes.

Q. And a strong, heavy chain?

A. Well, it was strong enough to load.

Q. Nothing broke?

A. No."

It is also suggested that having to load the rails across a ditch played some part in the accident, but plainly there can be no substance in this suggestion, because the rail that is said to have caused the injury already had been safely moved across the ditch and had been pulled almost entirely up the side of the gondola car (R 30).

On page 17 of respondent's brief it is further suggested that some part in the accident was played by the alleged fact that the workers had to stand in and near a ditch, but we fail to find any testimony whatever to the effect that any of the workers had to stand in a ditch, and we feel confident that this statement is the result of some misapprehension.

Apparently there can be no room for doubt that the real essence of the breach of duty attributed by respondent to petitioner is furnishing a gondola car instead

of a flat car, and obviously respondent must stand or fall upon proof that petitioner was negligent in so doing and that such negligence contributed to the injury as a proximate cause.

In measuring the extent of petitioner's duty to respondent in relation to the kind of car that ought to have been furnished, it should be kept in mind that the employer is not bound to furnish the latest or best tools or appliances that can be obtained for the use of his servants. As said in *Baltimore & Ohio R. R. Co. vs. Groeger*, 266 U. S., 521:

> "It is a well established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions, or to discard appliances upon discovery of later improvements * * *."

The Court also said in *Missouri Pac. R. R. Co. vs. Aeby*, 275 U. S. 426: "The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition."

There is no testimony at all to the effect that a gondola car is not a proper car on which to load rails, nor is there any testimony that gondola cars are not in common use for that purpose, nor is there any testimony that an accident had ever occurred before on account of the use of a gondola car instead of a flat car, nor is there any testimony indicating that petitioner had any reason whatever to anticipate that the use of a gondola car would result in injury to respondent.

That there was no unusual peril in loading rails

on a gondola is conclusively shown by the fact of the ten rails respondent was required to load on the gondola five had already been safely loaded, as will thus appear from his own testimony (R 39):

"Q. How many rails did you load into that car that morning?

A. Five.

Q. And did you load those five rails in the car the same way you were trying to load this sixth rail?

A. Yes.

Q. You did not get hurt in loading those five rails?

A. No.

Q. Did anybody else get hurt?

A. Not that I know of.

Q. You were right there on the job?

A. Yes.

Q. So that you loaded five rails in the car that morning in the same way that you attempted to load the sixth rail?

A. Yes; that is right.

Q. And were the five rails that you loaded in the car that morning the same kind of rails?

A. Yes."

In order to charge petitioner with responsibility for respondent's injury because a gondola car instead of a flat car was furnished not only must it appear that petitioner was negligent in so doing, but it must also appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen in the light of the circumstances. Mere possibility is not sufficient.

In *Brady vs. So. Ry. Co.*, 320 U. S., 476, the Court, in quoting from a former case, thus states the rule:

> "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The mere fact that if a flat car had been furnished the accident might not have happened is not sufficient to entail liability upon petitioner. As said in the Brady case, "the mere fact that with a sound rail the accident might not have happened is not enough."

After all, it might be appropriately suggested that if respondent is to be held to the allegations of the complaint, the cause of his injury was the selection by him of a bent rail out of a pile of forty rails from which he was directed to load ten rails (R 38), the cause of the injury being thus alleged in the complaint (R 6): "* * * In the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot."

Point II

Did the State Supreme Court Err in Sustaining the Submission for the Consideration of the Jury of Specifications of Negligence Not Supported by Evidence and Not a Proximate Cause of the Injury?

As to this point we shall not repeat what we have already said in the brief heretofore filed by us, but we

ask the attention of the Court to pages 22-25 of our former brief.

In addition to what we have heretofore said we now only desire to say that whatever view may be taken as to the other specifications of negligence, all of which we think are without supporting evidence, it is difficult to see how it could be contended that there was any testimony whatever justifying the submission of specifications (a) (R 6) and (g) (R 7) to the jury.

Specification (a) is as follows: "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." The rail from which respondent received his injury, at the time of the injury, had already been moved across the ditch without any trouble at all and was being placed in the car. Having to move the rail across the ditch could not possibly have had anything to do with the injury. Moving the rail across the ditch had already been safely accomplished.

Specification (g) is as follows: "In failing to provide plaintiff with proper supervision and direction with which to work." Respondent's own testimony shows (R 38) that he himself had the entire supervision and direction of the work, and if there was any negligence in that respect it was solely his own.

Point III

Did the Supreme Court of South Carolina Err in Sustaining the Trial Court's Charge to the Jury as to the Employer's Duty in Relation to Furnishing a Safe Place to Work and Safe Tools and Appliances?

If the jury could reasonably have understood from the charge of the presiding judge that petitioner's

duty in relation to furnishing a safe place to work and safe tools and appliances was absolute then it cannot be doubted that prejudicial error was committed, and that petitioner is entitled to a new trial. *Yazoo & Mississippi Valley R. R. Co. vs. Mullins*, 249 U. S., 531; *Baltimore & Ohio S. W. R. R. Co. vs. Carroll*, 280 U. S., 491.

Respondent contends that the charge of the presiding judge finds support from the case of *Patton vs. Texas & Pac. Ry Co.*, 179 U. S., 658, in which the duty of the master to furnish a safe place to work was referred to as positive. We think it quite obvious, however, that the word "positive" was used in that case in the sense of nondelegable, as pointed out on page 27 of the brief heretofore filed by us, and we ask the attention of the Court to what we have there said.

Respondent also contends that the charge of which complaint is made finds support in the case of *Bailey vs. Central Vermont Ry.*, 319 U. S., 350, it being claimed by respondent's counsel that the construction which they have placed upon *Patton vs. Texas & Pac. Ry. Co.*, supra, is expressly affirmed and adopted in that case. We do not so read the Bailey case although we have read it very carefully. We have been unable to find anything in the case to that effect. On the contrary we think that the Bailey case supports the position of the petition rather than that of respondent. While the Patton case is cited as to a matter entirely different from the question here involved.

Respondent seeks to avoid the consequence of the error committed by the trial judge by advancing the contention that a duty was imposed upon petitioner to request a clarification of the instructions to the jury. Matters of procedure such as this, of course, are regulated by the law of the forum, even though

the right sought to be enforced is one under the Federal Employers' Liability Act. In *Chesapeake & Ohio Ry Co. vs. DeAtley*, 241 U. S., 310, an action under the Federal Employers' Liability Act, the Court said: "Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable." An illustration of the application of this rule will be found in the quite recent case of *Reynolds vs. Atlantic Coast Line R. R. Co.*, 93 L. Ed., 475, (Advance Sheet No. 8), decided February 14, 1949.

The rule in South Carolina applicable to the question with which we are now concerned is so clearly and forcefully stated in *Coleman vs. Lurey*, 199 S. C., 442, 20 S. E. (2d), 65, that we take the liberty of quoting at length therefrom as follows:

> "It is well established by numerous decisions of this Court that any error on the part of the trial judge in the statement of the issues will be deemed waived if counsel fail to bring it to his attention. Among the many cases so holding we cite the following: Gowns v. Watts Mill, 135 S. C., 163, 133 S. E., 550; Hiller v. Bank of Columbia, 96 S. C., 74, 79 S. E., 899; Park v. Laurens Cotton Mills, 75 S. C., 560, 56 S. E., 234. There was, however, no error here in the statement of the issues.
>
> "We have likewise repeatedly sanctioned the sound principle that while the constitution requires that Judges 'shall declare the law' (Art. V, Sec. 26), this simply means that the Judge shall state the controlling principles of law applicable to the case in the light of the pleadings and the evidence, even if no request is presented by counsel for either party; but that if any elab-

oration thereof, or by a charge on some specific phase, is desired, counsel must bring the matter to the attention of the Court or it will be deemed to have been waived. An excellent statement of this rule, supported by many South Carolina cases cited in the footnote, is the following from 64 C. J., 838-841: 'It is a rule of very general application that, if instructions given are correct as far as they go, but are deficient merely because of their generality or failure to reach all points in the case, a party desiring additional instructions to be given must make a request therefor. As was said in an early decision in which Justice Story wrote the opinion, *it is sufficient that the Court has given no erroneous directions.* "If either party deems any point presented by the evidence to be omitted in the charge, such party may require an opinion from the Court upon that point; if he does not, it is a waiver of it." ' Emphasis added.)

"Moreover, this rule is especially applicable where, as in the case at bar, the trial Judge inquired at the conclusion of his charge to the jury as to whether counsel desired any additional or more specific instructions. See the recent case of Williams v. Southeastern Life Insurance Company, 197 S. C., 171, 14 S. E. (2d), 895, and the cases therein cited. But it is manifest that this rule does not apply if the Court has given 'erroneous directions.' To hold otherwise would impose upon counsel the rather delicate and difficult task of presenting exceptions to the charge before the retirement of the jury, a practice which we have not adopted, although it does prevail in some other Courts and jurisdictions. We think that the law was clearly and correctly expressed in the

opinion of this Court delivered by Mr. Justice Carter in the case of Steinberg v. South Carolina Power Co., 165 S. C., 367, 163 S. E., 881, 883, as follows: 'While it is the duty of counsel to follow the Judge's charge and at the conclusion of the charge to call to the Judge's attention any misstatement of issues, in order that the Court, jury, and opposing counsel may not be misled, and to request a fuller charge on any phase of the law, if in the opinion of counsel a fuller charge is necessary to enable the jury to render a correct verdict and do justice between the litigants, it is not incumbent upon counsel, in order to protect the rights of his client, to call the Judge's attention to what counsel considers an erroneous statement of the law applicable to the case. To make such requirement might place counsel in an embarassing position.' "

CONCLUSION

Regardless of whether the social results accomplished be good or bad, the law still requires proof of negligence in order to recover for an injury under the Federal Employers' Liability Act, and even though the social results seem unfair, if respondent has failed to show negligence resulting in injury to him as a proximate cause, he cannot fairly be permitted to recover. The situation is so well expressed by the Circuit Court of Appeals of the Third Circuit in *Echenrode vs. Pennsylvania R. R. Co.*, 164 Fed. (2d), 996, (affirmed by the Supreme Court of the United States, November 15, 1948) that we do not believe we can better close this brief than by quoting the following from the opinion of the Court in that case:

"Any Federal Judge who sees these railroad

accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case."

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. ——

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

versus

L. C. HASELDEN, RESPONDENT

OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW

The decision of the Supreme Court of the State of South Carolina will be found on page 126 of the record, and in 53 S. E. (2d), page 60 (S. E. Reporter, Advance Sheet No. 1).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this case contained on Page 6 of petitioner's brief, *i. e.*, that the case was tried under an Act of Congress of the United States commonly referred

to as the Federal Employers' Liability Act (USC Title 45, Section 51-59) is correct.

STATEMENT OF CASE

Respondent, a forty-year old family man, was a section foreman for petitioner, having charge of the maintenance and repair of a section of tracks in and near Society Hill, South Carolina, which are used by petitioner in intrastate and interstate commerce. Prior to July 10, 1946, respondent received orders to load ten rails which were located across a ditch from the railroad tracks of petitioner near Society Hill, S. C., which were to be used by petitioner in repairing its lines used in interstate commerce (R. 68, 69). Upon receiving the orders, respondent was told that a gondola car would be furnished for this work instead of a flat car which is normally used (R. 72). Respondent informed his superiors immediately that he could not load the rails on a gondola car from across this ditch, and requested that they send additional men to aid in loading if a gondola car was to be used (R. 29, 36). Petitioner refused to send additional men and sent the gondola car with instructions regarding the manner in which the rails were to be loaded, including instructions to use short rails across the ditch to the top of the gondola (R. 29). On July 10, 1946, respondent began loading the rails in accordance with his orders and instructions. Two rails used as skids were placed on the side of the gondola, one on each end, and the other end of the skids across the ditch. Three men, including respondent, were in the car and three on the ground. A rope was placed around one end of a rail, and while the men on the ground were pushing, the men in the car would pull the rail to within about six inches of the top of the gondola and tie it to prevent it sliding back down. Then they went to the other end and pulled it up. While the rail was being held in place,

respondent moved to lay his rope across the car and when returning, the loose end sprung in the car striking respondent crushing his leg and foot. This was the sixth rail loaded (R. 27-30, 31, 36-37, 50, 51).

The allegations of negligence in the complaint are correctly set forth in petitioner's brief at Page 2 (R. 6, 7).

Petitioner admitted certain formal allegations of the complaint and in substance entered a general denial and pleaded contributory negligence and assumption of risk by way of affirmative defense. Respondent has taken the position that assumption of risk is not a defense, and a plea of contributory negligence does not properly plead sole negligence.

Petitioner has not set forth in its summary statement of the matters involved all of the testimony relating to the manner in which the injury was received, and for convenience the testimony quoted in petitioner's brief (Page 3) and the additional testimony relating to the injury is quoted (R. 27-30):

"Mr. Mozingo: We don't care to offer the whole book unless counsel care to offer it, we would like just to have rule 1057 and rule 1060 as having a bearing on this. Will you read to the jury what rule 1057 is or do you want me to?

A. You read it.

Mr. Mozingo: 'They will report to and receive their instructions from the road master. They must have a copy of the current time table'.

Q. Now, who was your roadmaster?

A. Mr. J. G. Dial.

Q. He is considered your superior or your boss?

A. Yes.

Q. That is what they mean in this rule, Mr. Dial was the man to whom you reported and from whom you got your instructions?

A. Yes.

Q. Now rule 1060 says: 'They are required to direct the labor of their hands and are expected to engage personally in all work necessary to keep their section in proper order'.

Q. Now on July 10th were you working for the railroad, 1946?

A. Yes.

Q. What were you doing that day?

A. Loading rails.

Q. Now, before those rails were loaded, who had given you instructions to load these rails?

A. Mr. Dial.

Q. That is the road master?

A. Yes.

Q. When had Mr. Dial given you these instructions?

A. On the afternoon before.

Q. What did he tell you about loading the rails, and what did you tell him?

A. He told me that he wanted me to load ten rails, and load them the next morning first thing and ship them to McFarlane.

Q. Where is McFarlane?

A. It is about twenty miles up to North Carolina.

Q. In North Carolina?

A. Yes.

Q. Now, how did you go about loading these rails?

A. He told me to load the rails and ship them up there and I asked him if he would get a flat car and he told me to load them and I could get a flat car and order a flat car and if I could not get that to get a gondola. I went to order the car and they could not get a flat car and they sent a gondola, and I told them if they sent a gondola I would not be able to load it from where the rails are at.

Q. How long are the rails?

A. Thirty-three feet.

Q. And how heavy?

A. Eighty-five pounds to the yard.

Q. You told him you did not have enough men to load and what happened?

A. Then he told me to put up some skids and load them from the side and take some short rails and load from the side and get some rope and load from the side, and I asked him if he would send me some rope, and he said he would not have time and I could borrow some or get some around there, and I went and bought the rope.

Q. Now, Mr. Haselden, is this what you call a gondola?

A. Yes.

Q. Would you just show the jury here exactly how you proceeded to load those rails?

A. The rails were over here, we put the rail up and put a rope around there and pulled it up within six or eight inches of the top.

Q. Where were you?

A. Inside the car.

Q. Where were the other men?

A. Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end of the car and I turned around came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it.

Q. Now, you say that the men here were pushing until it got out of reach?

A. Yes.

Q. If you had had a flat car as you ordered, would it have been necessary for them to push it that high up?

A. They could have pushed it up without getting it out of reach.

Q. The rail would not have ever been out of reach to the men on the ground?

A. No.

Q. If you had had a flat car as you ordered and did not receive, what would have been the way that it would have been loaded?

A. You could load on the skid but you would have had power to push it up with. Pulling with a small rope, we did not have power to load."

* * *

(R. 31)

"Mr. MOZINGO: Mr. Haselden, you were in the car then at the time the rail came down on you?

A. Yes.

Q. What happened after that?

A. Well, I was jerked down and it caught my foot and I tried to staighten up and fell over backwards. I had to ask one of the men to untie my shoe.

Q. Now, these were being loaded, I believe you said, from across a ditch?

A. Yes.

Q. And all of this was pursuant to, and the way you loaded this car, was pursuant to instructions received by you from the road master, Mr. Dial?

A. Yes."

* * *

(R. 36-37)

"Q. Now, Mr. Haselden, when you were talking to the road master there about loading these rails, state whether or not you asked for additional help?

A. I did; I asked him to let Mr. Jones come up and help me load.

Q. Who is Mr. Jones?

A. He is the section foreman up above me at Cheraw.

Q. Does Mr. Jones have a crew of men?

A. Yes, the same as I do.

Q. And this help was not given you?

A. No, he said I could load my rails and put up the skid and go ahead and load it."

* * *

(R. 50)

"Q. Now, Mr. Haselden, about the rope that they asked you about in the statement, state whether or not you asked Mr. Dial, your superior, for some rope to load this?

A. I did, I asked him if he was going to send me the rope to load with.

Q. Did he send you any rope?

A. No sir; he did not.

Q. He did not provide you with any grease to grease the rails with?

A. No.

Q. Now, they asked you about hiring the men, you hired these fellows that were helping load but who were they paid by?

A. The Atlantic Coast Line Railroad.

Q. You, of course, were responsible to Mr. Dial, yourself?

A. Yes."

* * *

(R. 51)

"Q. * * * Did the rail come up on the gondola and spring over there in the car on you or not or was it shoved over last?

A. It was pulled up, whenever they went to pull the rail up, the rail hit the side of the gondola and turned over to me just as I walked up there to help the men with the rail."

The manner in which the injury occurred was repeated on cross examination (R. 44-48).

The quoted portion of the charge (petitioner's brief, Page 4) is only part of the instructions given relating to this matter. The additional portion is added below:

"Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time. It is the duty of the master to furnish a sufficient number of men to do the work in which the servant is engaged with reasonable safety, or with reasonable safety to all here engaged in the accomplishment or the performance of that particular work. It is the duty of the master to furnish a safe number of persons to perform the services required, or do the particular work or piece of work assigned. The test or degree of care that the master must exercise is due care, that is, it is the duty of the master to exercise due care to protect the servant from injury."

The remaining portions of petitioner's statement of the case are substantially correct.

SUMMARY OF ARGUMENT

Respondent will attempt to show that this Court should deny the writ of *certiorari* to the Supreme Court of South Carolina for the reasons:

A. That under the decisions of the United States Supreme Court relating to the liability of the master for injuries to an employee in cases brought under the Federal Employers' Liability Act, respondent was entitled to have the issues of negligence of petitioner submitted to the jury.

B. There was no error in the trial court in submitting the specifications of negligence contained in the complaint to the jury, there being evidence to support the various

specifications; that the several elements from which negligence could be inferred were so closely interwoven as to require the submission of all the specifications of negligence for the consideration of the jury.

C. That there was no error in the charge of the trial judge as the language used has been approved by the Supreme Court of the State of South Carolina and the United States Supreme Court in actions of this type.

D. This court has expressed itself as being unwilling to review cases already canvassed by two or three courts, especially where the controlling legal principles have been recognized by the court below, review being granted only on the basis of importance to the operation of our federal system, the importance of the outcome to the parties not being enough.

ARGUMENT

Point I

Was there sufficient evidence of actionable negligence to justify the submission of the case to the jury?

As has been stated, this action is under the Federal Employers' Liability Act, and resulted in a judgment for respondent in the amount of Forty-five Thousand ($45,000.00) Dollars for serious and permanent injury. Petitioner in the first paragraph of its argument on Page 15 quotes only a portion of Paragraph 5 of the complaint, and the entire complaint (R. 4-7) should be considered as well as the specifications of negligence (R. 7).

The testimony of respondent relating to the manner in which the injury occurred has heretofore been quoted under the Statement of the case, and will not be again repeated.

For convenience the following portion of the Federal Employers' Liability Act (45 USCA, Section 51) is quoted:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In arriving at the intention of Congress in passing the Act, the Court is urged to consider the fact that the common law defense in actions by a servant against the master of assumption of risk does not apply, and the defense of contributory negligence applies only in so far as it is to be considered by the jury in mitigation of damages.

The decisions of the Supreme Court of the United States are all in accord, and it is only necessary to here apply the rules laid down to the facts as herein set forth. A review of a few of the most recent cases should be pertinent.

The case of *Blair v. Baltimore & O. R. Co.*, 89 L. Ed. 490, 323 U. S. 600, is so similar from a factual standpoint to the case here under consideration that except for the name of the parties and the fact that steel tubes instead of steel rails were being moved, it could be considered the same case. In the *Blair case*, the Supreme Court of the State of Pennsylvania reversed a judgment of the Court of Common Pleas, and upon writ of certiorari the United States Supreme Court reversed the State Court. We quote at length from the opinion:

> (P. 493) "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to

take away a goodly portion of the relief which Congress has afforded them'.

* * *

(P. 493) "* * * Petitioner's duties were to load and unload inbound and outbound freight. In unloading a car standing at the platform adjacent to respondent's warehouse, petitioner came to three 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a thousand pounds each. The pipes were greased and slick. The petitioner went to his superior, informed him that the pipes were too heavy for him to move and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. This suggestion was rejected and petitioner was then told to get Mr. Miller, the car inspector, and Mr. Fanno, the section man, to help him unload.

"Petitioner's insistence that the three could not unload the heavy pipes was overridden, and he was then told to go ahead and do the work or they 'would get somebody else that would'. Under these circumstances, petitioner undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck which had backed up to the warehouse platform on the opposite side from the railroad car. The best equipment available for moving the pipes was a 'nose truck' of the kind commonly used in railroad stations to move freight and luggage. It was about five feet long and two feet high, consisting of a flat metal frame, with an upright flange and two wheels at one end and wheelbarrow handles at the other. The problem was to balance three greased, 1,000-pound, 30-foot steel tubes on this truck, move them across two platforms through the warehouse and place them in the consignee's truck. The men took the nose truck into the car, managed to get the first pipe lengthwise on it, worked it through the car door to the platform over a

steel bridge connecting the car and the platform, and then carried it to the waiting truck. Petitioner held one handle of the nose truck with one hand and the steel tube with the other. Miller occupied the same position as to the other handle and the pipe. Fanno held the pipe and the truck at its wheel end. They were all necessarily crouching, since the truck was only two feet high when moved in a level position, as it had to be, to keep the tube from slipping off. **The first tube was successfully moved.** While they were attempting to move the second tube **in the same manner,** it slipped. Fanno and Miller released their holds, but petitioner did not. The heavy tube in slipping caused the truck to kick back resulting in petitioner's injury." (Emphasis ours.)

* * *

(P. 494) "* * * The negligence of the employer may be determined by viewing its conduct as a whole. *Union P. R. Co. v. Hadley,* 246 U. S. 330, 332, 333, 62 L. Ed. 751, 754, 755, 38 S. Ct. 318. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

* * *

(P. 494) "The court below, however, thought that the plaintiff should not recover because he had assumed the risk of this danger. It is to be noted that at the time this case was tried Congress had passed an Act which completely abolished the defense of assumption of risk."

There, as here, petitioner went to his superior and informed him that the pipes to be loaded were too heavy and that it was not customary to unload the pipes in this manner, that the equipment provided was not proper for unloading heavy material, that the number of men given him was not sufficient, the place for work was unsafe for this

work in this manner, but notwithstanding this, he was directed to go ahead and "do the work".

Petitioner herein urges that the method, the number of men, equipment, and etc., were sufficient as proven by the fact that several rails were loaded without mishap. In the *Blair case* as in the case here, the first tube was successfully moved in the same manner as the injured employee was attempting to move the second tube.

Had petitioner furnished respondent with a flat car upon which to load the 935-pound rails, which is normally furnished, the five men with respondent would have been sufficient, as they would not have had to push the rails so high and could all have applied their strength at the same time. As it was, part of the men had to get inside the car and part stayed on the ground until the rail was pushed beyond their reach, thereby dividing their force. As each rail was loaded, the strength of the men necessarily decreased so that the force used to load the rail which injured respondent was greatly decreased. It also must be kept in mind that respondent was not furnished with proper ropes, etc., was directed to use short rails which he had to place across a ditch making it further difficult for the men to push the rails up, all of which contributed to respondent's injury.

Language appropriate to these conditions and circumstances is contained in the opinion in the case of *Ellis v. Union Pacific Railroad Company*, 91 L. Ed., 572, 329 U. S., 649 (decided February 3, 1947). That action was brought under the Federal Employers' Liability Act, and resulted in a verdict for the plaintiff in the amount of Ten Thousand ($10,000.00) Dollars. The Supreme Court of the State of Nebraska reversed the lower court, and upon writ of certiorari being granted, the United States Supreme Court

reversed the Supreme Court of Nebraska. The following is quoted from the decision:

> (P. 576) "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant v. Peoria & P. U. R. Co.* 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, *supra*. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender v. Kurn, supra* (327 U. S. p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury."

Here, as there, there is a reasonable basis for concluding that defendant's negligence caused the injury.

The following is quoted from *Bailey v. Central Vermont R. Co.*, 87 L. Ed., 1444, 319 U. S., 350:

> (P. 1446): "* * * The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.
>
> "Bailey died from the injuries resulting from the fall."

* * *

(P. 1447) "Section 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees'. The rights which the Act creates are federal rights protected by federal rather than local rule of law. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L. R. A. 1915 C 1, 8 N. C. C. A. 834, Ann. Cas. 1915 B 475; *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 76 L. Ed. 157, 52 S. Ct. 45. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line R. Co. v. Horton, supra* except as Congress has written into the Act different standards. *Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, ante, 610, 63 S. Ct. 444, 143 A. L. R., 967. At common law the duty of the employer to use reasonable care in furnishing his employees with a **safe place to work** was plain. 3 Labatt, Master & Servant, 2d ed. § 917. That rule is deeply ingrained in federal jurisprudence. *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 664, 45 L. Ed. 361, 364, 21 S. Ct. 275, and cases cited: *Kreigh v. Westinghouse, C. K. & Co.*, 214 U. S. 249, 256, 257, 53 L. Ed. 984, 988, 29 S. Ct. 619; *Kenmont Coal Co. v. Patton* (CCA 6th) 268 F. 334, 336. As stated by this Court in the *Patton case* it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery'." * * * (Emphasis ours.)

* * *

(P. 1447) "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the

car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, ante, 610, 63 S. Ct. 444, 143 A. L. R. 967, (*supra*) as well as issues involving controverted evidence. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 32 L. Ed. 478, 480, 9 S. Ct. 118; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044. To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. *Jacob v. New York*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

At the risk of repetition, we compare the case under consideration with the *Bailey case*, and state that the nature of the task which Haselden undertook (loading ten heavy

rails), the hazards which it entailed (injury by heavy rails falling or slipping), the effort which it required (pushing 935-pound rails up short skids with three men pushing until the rails were out of reach and three pulling), the kind of footing the workers had (walking down into and up and across a ditch while raising the rails), the space where he could stand (in the gondola running from one end to the other, trying to do the work of two men, three of the other men in a ditch), the absence of a guard or means to prevent rail from falling or slipping (insufficient tools, nothing to prevent rail from falling into the gondola), the height of the gondola above the ground (the side of the gondola was approximately three feet higher than a flat car and the workers had to stand in and near a ditch), and the fact that a flat car and additional men, better equipment and better plans could have been furnished "are all circumstances for the jury to weigh and appraise in determining whether" petitioner in furnishing Haselden "with that particular place in which to perform the task was negligent".

The case of *Urie v. Thompson, Trustee, etc.*, 93 L. Ed., 927 (Advance Sheet No. 16, Opinion filed May 31, 1949) ..... U. S., ..., indicates the extent of the coverage afforded by the Federal Employers' Liability Act. There, it was held that plaintiff's petition stated a cause of action under the Federal Employers' Liability Act when plaintiff contracted silicosis, reversing the State Supreme Court and reinstating a verdict in the amount of Thirty Thousand ($30,000.00) Dollars. The opinion stated that the humanitarian purposes sought to be achieved by this legislation, its accepted standard of liberal construction in order to accomplish those objects, and the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation must be con-

sidered; that on its face every injury suffered by an employee while employed by reason of the carrier's negligence was made compensable.

In a concurring opinion Mr. Justice Frankfurter had this to say:

> (P. 948) * * * "So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended. Therefore, if a claim is made that an injury is casually related to a carrier's failure to maintain standards of care appropriate for employment on a railroad, the Federal Employers' Liability Act entitles an employee to establish that claim to a jury's satisfaction * * *.

Petitioner would have this court interpret the opinion of the Supreme Court of South Carolina as indicating that it holds that this act makes the railroad an absolute insurer. This interpretation is incorrect. It is alleged and there was testimony to support the allegations of the complaint to the effect that defendant was negligent in the particulars therein stated, and under the testimony petitioner was entitled to have the issues of negligence submitted to the jury.

Clyde Wilkerson v. Wilson McCarthy, 93 L. Ed. 408 (Advance Sheet No. 7. Opinion dated January 31, 1949). ..... U. S. .....

Howard F. Coray, etc. v. Southern Pacific Company, 93 L. Ed. Page 243 (Advance Sheet No. 5, Opinion dated January 3, 1949). ..... U. S. .....

If there is evidence of forseeable danger to the employee, it is a question for the jury. *Lillie v. Thompson*, 92 L. Ed. 73, 332 U. S. 459.

Had better tools been furnished, proper plans or advice as to performing the work been given, more men allowed respondent to assist in loading the rails, different appliances at the place in question, a flat car sent to respondent, this injury would never have occurred, and it is submitted that the testimony was ample to submit the issue of petitioner's negligence in these respects to the jury. The negligence of the employer should be determined by viewing his conduct as a whole, and especially is this true where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others. *Blair v. Baltimore & O. R. Co., supra.*

The fact that the rail which injured respondent was bent did not of itself cause the injury, but the various negligent acts and omissions of petitioner contributed to the accident which resulted in respondent's injury, and as has been pointed out above, the fact that five rails had already been loaded does not negative the inference of negligence, but on the contrary makes a conclusion of negligence inescapable, as the lack of a sufficient number of men increased the hazard as each rail was loaded, and as was stated in *Blair v. Baltimore & O. R. Co., supra,* the fact that the same act was previously successfully done in the same manner, does not preclude a recovery by respondent.

Point II

Did the State Supreme Court err in sustaining the submission for the consideration of the jury the specifications of negligence?

Petitioner cites one opinion of the United States Supreme Court in support of this point, *Wilmington Star Min. Co. v. Fulton,* 205 U. S. 60, 51 L. Ed. 708. This case was

decided in January, 1907, and is not authority for petitioner's position. This was an action for wrongful death of plaintiff's intestate, involved no federal act, and was in the Federal Court solely because it was removed there upon the grounds of diversity of citizenship of the parties. The case involves the law and legislative acts of the State of Illinois.

As already pointed out, all the acts of defendant were interwoven and each imparted character to the other, each was a link in an unbroken chain of reasonably forseeable events. *Lillie v. Thompson, supra.*

Petitioner reverts constantly to the argument that five rails had already been loaded, and would have the court hold that there was no evidence from which the jury could find negligence under specification "A". The court is referred to what has already been said under Point I with reference to the unsafe place to work in loading heavy rails across the ditch, and strain on these men in loading five rails before respondent's injury. *Blair v. Baltimore & O. R. Co., supra.*

Specification "B" is supported by the testimony that respondent was directed to take short rails, place them across the ditch, and had an insufficient amount of rope with which to work and given no instruments with which to work.

The failure to give respondent sufficient help and the failure to provide a safe place to work after notice to petitioner, the failure to provide respondent with proper and adequate tools, grease for the skids, and the result in allowing said rail to injure respondent has already been discussed under Point I, and this evidence warrants the submission of the question of negligence under Specifications "C", "D", "E", and "H" to the jury.

There was inference of negligence in the failure of petitioner to give respondent proper plans and methods and better supervision with which to work sufficient to support specifications of negligence "F" and "G". This has been discussed under Point I.

Negligence on the part of the employer in any of these respects is sufficient to warrant a recovery by the employee. This rule is deeply ingrained in federal jurisprudence. *Bailey v. Central Vermont R. Co., supra.*

Point III

Did the Supreme Court of South Carolina err in sustaining the trial Judge's charge to the jury as to the employer's duty in relation to furnishing a safe place to work and safe tools and appliances?

The pertinent portion of the judge's charge is set forth under statement of case, and will not be repeated here. It is axiomatic that the charge of a trial judge should be considered as a whole. He charged that it is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and wherein to work (R. 99). The trial judge went on, however, in the next sentence to charge that the master is required to furnish the servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. Throughout the charge, it refers to the duty of the master as that which is reasonable under the circumstances, and finally he states that the test or degree of care that the master must exercise is due care, and in order that there be no misunderstanding, it was repeated to the jury that it is the duty of the master to exercise due care to protect the servant from injury.

Much stress is placed upon the use of the word "positive" in the judge's charge, and petitioner seeks to show that this word is synonomous with "absolute". Such a meaning cannot be attached to the word "positive" as used in this charge.

In the case of *Tucker v. Holly Hill Lumber Co.*, 200 S. C. 250, 20 S. E. (2d) 704, it was stated that it is the positive duty of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to do his work.

It was stated in *Nuckols v. Great Atlantic and Pacific Tea Co.*, 5 S. E. 2d 862 (864), 192 S. C. 156, that these duties on the part of the master are positive, absolute and personal.

The case of *E. M. Patton, etc. v. Texas and Pacific R. Co.*, 45 L. Ed. 361, 179 U. S. 658, states that this duty of the employer is a positive one. We quote from the language of the opinion:

> (P. 364) * * * "That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a **positive** duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe" * * * (Emphasis ours.)

The use of the word "absolutely" in the same sentence shows the legal distinction in such cases between it and the word "positive".

Since the decision in this case the standard of care required has been enlarged and a stricter duty imposed upon the employer as indicated by the fact that assumption of risk and contributory negligence is not now a defense. The

rights which the act creates are federal acts protected by federal rather than local rules of law, and these federal rules have been largely fashioned from the common law, except where congress has written into the act different standards. The rule as laid down in the *Patton case* not only has not been modified by act of Congress or decision of this court, but the duty of the employer as stated in the *Patton case* was expressly affirmed and adopted as the law in the case of *Bailey v. Central Vermont Railway, supra,* decided May 24, 1943.

The following is quoted from Volume 33, Page 57 of "Words and Phrases":

> "In an action for injuries to a servant, a charge that the master owes the **positive** duty to an employee to provide him with a reasonably safe place to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe', is a correct statement of the law, and is not objectionable as requiring the master to insure the safety of the place; the word 'positive' being used rather as the antithesis of the word 'delegable' than as a measure of the diligence required of a master. *Harris v. Brown Bay Logging Co.*, 106 P. 152, 154, 57 Wash. 8." (Emphasis ours.)

In *Coray v. Southern Pacific Company, supra,* which was an action under the Federal Employers' Liability Act, the court held that the language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.

Here we have the correctness of the use of this word "positive" in the judge's charge backed by authority of the Supreme Court of the State of South Carolina, the courts of other states, "Words and Phrases", which has been ac-

cepted as an authority in such matters, and lastly by the opinions of the United States Supreme Court, the court of last resort and the court which petitioner now asks to review this case on this ground.

At the conclusion of the charge, the trial judge inquired if there was anything further requested by petitioner. While it is the duty of the trial judge in the courts of South Carolina to properly instruct the jury on all issues involved without request, if a clearer or more complete charge is desired, it is incumbent upon the party desiring the same to request it.

CONCLUSION

Every consideration was given petitioner during the trial of this case. The trial judge had the further opportunity to consider his rulings and charge upon motion for a new trial, which is the practice in this state. The Supreme Court of the State of South Carolina has passed upon this case sustaining the same applying federal rules of law, indicating by its thorough and lengthy opinion and five months consideration before handing down a unanimous decision, that the greatest care was observed in passing upon all questions before the court. Under the law as announced by the Supreme Court of the State of South Carolina and the United States Supreme Court, the most recent decisions being cited herein and relied upon, it is earnestly submitted that there is no error.

In a concurring opinion in the case of *Clyde Wilkerson v. Wilson McCarthy, supra,* Mr. Justice Frankfurter had this to say:

> (P. 411) "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that

the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. * * * Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough" * * *.

To the same effect is the concurring opinion of Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Chief Justice Stone in *Bailey v. Central Vermont R. Co., supra.*

(P. 1449) "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below **recognized the controlling legal principles** but was claimed to have applied them improperly to the specific facts disclosed." * * * (Emphasis ours.)

* * *

(P. 1449) "In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries".

For the foregoing reasons, it is respectfully submitted that the writ of certiorari to the Supreme Court of South Carolina should be denied.

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CERTIORARI DENIED